A **PP lwn. FAIZOULL AHMAD & SATU LAGI RAYUAN**

MAHKAMAH RAYUAN, PUTRAJAYA
AZMI ARIFFIN HMR
NOORIN BADARUDDIN HMR
MEOR HASHIMI ABDUL HAMID HMR
B [RAYUAN JENAYAH NO: W-09-359-10-2022
& W-09-360-10-2022]
12 NOVEMBER 2025

C **Abstrak** – *Apabila bukti penting wujud secara muktamad yang boleh membuktikan kes pendakwaan tetapi tidak dikemukakan, tertuduh mesti diberi faedah keraguan. Kegagalan mengemukakan bukti utama, terutamanya apabila kewujudannya dibuktikan, boleh menjejaskan kes pendakwaan dan menyokong versi pembelaan. Ini juga boleh membentuk jurang pembuktian yang teruk, serta inferens buruk boleh*
D *dibuat terhadap pihak pendakwaan.*

UNDANG-UNDANG JENAYAH: *Kanun Keseksaan – Seksyen 409 – Pecah amanah jenayah – Sama ada tertuduh dengan curangnya melupuskan wang dan meluluskan pembayaran tanpa kelulusan Lembaga Pengarah FELDA ('Lembaga')*
E *– Kegagalan pihak pendakwaan mengemukakan rakaman audio mesyuarat – Sama ada bukti kritikal berkaitan mesyuarat Lembaga – Sama ada kegagalan mengemukakan bukti utama menjejaskan kes pendakwaan – Wujudnya dua set minit mesyuarat – Sama ada percanggahan menimbulkan keraguan besar tentang ketepatan dan kebolehpercayaan versi pendakwaan – Sama ada terdapat jurang*
F *pembuktian yang teruk – Sama ada inferens buruk harus dibuat terhadap pihak pendakwaan – Sama ada pihak pendakwaan gagal membuktikan melampaui keraguan munasabah bahawa tertuduh bertindak secara tidak jujur – Sama ada terdapat salah arah serius undang-undang – Sama ada mahkamah wajar campur tangan*

G Pendakwaan terhadap kedua-dua tertuduh bermula di Mahkamah Sesyen atas dua pertuduhan pecah amanah jenayah, satu kesalahan bawah s. 409 Kanun Keseksaan. Salah satu tertuduh telah meninggal dunia ('si mati'). Si mati adalah Timbalan Ketua Pengarah (Sumber Strategik) FELDA manakala responden pula adalah Pengarah Besar FELDA. Pada bulan Mac 2013,
H Lembaga Pengarah FELDA telah memberikan kelulusan untuk penubuhan FELDA Investment Corporation Sdn Bhd ('FIC') untuk melaksanakan pelaburan strategik. Untuk merealisasikan hasrat Perdana Menteri agar negara ini memasuki pasaran global penternakan ikan sturgeon, pada 4 Julai 2013, Lembaga Pengarah FELDA telah memberikan kelulusan secara dasar
I kepada FELDA untuk mencari sumber pendapatan melalui projek penternakan itu. Lembaga Pengarah FELDA melalui Minit Mesyuarat FELDA Bil 299 pada 26 Mac 2013 telah membentangkan dua cadangan, satu

untuk penubuhan FIC dan satu lagi adalah untuk penubuhan syarikat usahasama bersama dengan syarikat Korea, MMC Hassed Co Ltd. Kedua-dua cadangan tersebut kemudiannya dibawa ke Jawatankuasa Pelaburan FELDA. Pada 9 April 2013, mesyuarat meluluskan penubuhan syarikat usahasama tertakluk pada 'due diligence' ('kajian kebolehlaksanaan syarikat') dibuat terhadap syarikat MMC Hassed Co Ltd, maklum balas daripada Duta Malaysia di Korea Selatan ke atas MMC Hassed Co Ltd dan penemuan kajian kebolehlaksanaan dibentangkan semula pada Jawatankuasa Pelaburan FELDA. Penubuhan FIC kemudiannya diluluskan. Si mati kemudiannya telah ke Korea untuk menjalankan 'due diligence'. Lanjutan daripada itu, Jabatan Pengurusan Transforvasi menilai dokumen-dokumen yang diterima dan Jabatan Undang-Undang FELDA juga telah menilai dokumen-dokumen tersebut dan menyediakan draf perjanjian usahasama. Pada 2 Julai 2013, FIC diperbadankan. Pada 4 Julai 2013, Lembaga Pengarah FELDA telah mengadakan mesyuarat khas Bil 304 (P100) dan mempersetujui usahasama projek sturgeon. Bagi memudahkan pelaksanaan projek sturgeon ini, beberapa anak syarikat telah diperbadankan. Ini termasuklah Capital Protokol Sdn Bhd (kemudian dinamakan FIC), FELDA Korea Malaysia Sdn Bhd dan FELDA Cariartive Sdn Bhd. Si mati dan responden memegang jawatan sebagai pengarah dalam ketiga-tiga anak syarikat ini. Dikatakan bahawa tanpa pengetahuan Lembaga FELDA, selepas projek penternakan ikan sturgeon dan kaviar dilaksanakan, Jabatan Transforvasi telah memohon Jabatan Kewangan memproses permohonan bayaran untuk projek penternakan ikan sturgeon dan kaviar untuk dibayar kepada pihak Korea menggunakan dana FELDA melalui FELDA Korea Malaysia Sdn Bhd dan FELDA Caviartive Sdn Bhd. Antara 13 Januari 2014 dan 23 Julai 2014, dua pembayaran telah dibuat melalui FELDA Caviartive Sdn Bhd. Bayaran pertama berjumlah RM25,999,000 dibuat berdasarkan perjanjian 'technology transfer' dan 'supply agreement'. Manakala bayaran kedua berjumlah RM21,626,500 dibuat bawah perjanjian 'Design-Build Contract Agreement' yang ditandatangani antara FELDA Caviartive Sdn Bhd dan 12C Hassed Co Ltd. Pihak pendakwaan mengatakan bahawa kedua-dua bayaran ini dibuat tanpa mendapat kelulusan Lembaga Pengarah FELDA. Lembaga FELDA dikatakan tidak pernah meluluskan bayaran-bayaran tersebut sedangkan Lembaga Pengarah FELDA mahukan kajian terperinci dibuat dan dikemukakan untuk kelulusan sebelum projek sturgeon dilaksanakan. Pihak pendakwaan mendakwa tiada kajian dibuat atau dikemukakan untuk kelulusan. Pada 29 September 2015, Lembaga Pengarah FELDA dimaklumkan bahawa sejumlah RM48,151,399.50 telah dibelanjakan untuk projek penternakan ikan sturgeon dan kaviar oleh FELDA Korea Malaysia Sdn Bhd dan FELDA Caviartive Sdn Bhd yang sepatutnya perlu mendapatkan kelulusan Lembaga FELDA terlebih dahulu. Wang tersebut dikatakan telah dibelanjakan secara tidak sah oleh kedua-dua syarikat tersebut tanpa kelulusan Lembaga. Jumlah tersebut juga merangkumi jumlah

yang dilupuskan tanpa kelulusan Lembaga Pengarah FELDA. Lembaga FELDA kemudiannya memutuskan untuk tidak meneruskan projek penternakan ikan sturgeon dan kaviar. Lembaga FELDA juga mengarahkan rundingan dibuat dengan pihak Korea untuk menamatkan perjanjian yang tidak sepatutnya dimasuki oleh responden dan si mati yang dikatakan tidak melindungi kepentingan FELDA. Pada 2 Februari 2016, Lembaga Pengarah FELDA memutuskan FELDA Korea Malaysia Sdn Bhd dan FELDA Caviartive Sdn Bhd dibubarkan. Pada 2 Ogos 2016, Lembaga Pengarah FELDA dimaklumkan bahawa berdasarkan pada penyata kewangan FELDA tahun 2015, FELDA mengalami kerugian bersih sebanyak RM1,053,239,013 bagi penyata pendapat berakhir 31 Disember 2015. Akibat kerugian tersebut, Jabatan Audit Negara telah menjalankan audit ke atas Kumpulan FELDA dan mendapati terdapat empat arahan Lembaga FELDA yang tidak dipatuhi dalam projek penternakan ikan sturgeon dan kaviar tersebut. Antaranya pemantauan yang lemah, keputusan syarikat subsidiari FELDA dibuat di peringkat Lembaga Pengarah syarikat subsidiari, tiada kajian terperinci berkenaan dengan 'feasibility' dan 'due diligence' yang bertentangan dengan manual dan dasar strategi pelaburan Kumpulan FELDA serta penubuhan syarikat subsidiari FELDA yang tidak mendapat kelulusan Menteri dan sokongan Menteri Kewangan Malaysia. Hakim Mahkamah Sesyen telah mendapati kedua-dua tertuduh bersalah dan disabitkan terhadap pertuduhan-pertuduhan tersebut. Terkilan, tertuduh-tertuduh merayu ke Mahkamah Tinggi. Hakim Mahkamah Tinggi ('HMT') membenarkan rayuan tertuduh-tertuduh dan mengenepikan perintah sabitan dan hukuman oleh Mahkamah Sesyen. Oleh itu rayuan ini terhadap keseluruhan perintah Mahkamah Tinggi. Isu utama yang harus diputuskan adalah sama ada terdapat keperluan untuk kajian projek sturgeon dan kaviar ini dibentangkan semula pada Lembaga FELDA untuk mendapat kelulusan.

Diputuskan (menolak rayuan)
Oleh Azmi Arifin HMR menyampaikan penghakiman mahkamah:

(1) Menurut keterangan SP27, perenggan 4 Minit Mesyuarat Khas Bil 304 (P100) menyatakan bahawa '(iv) Bentangkan kepada Lembaga laporan kajian terperinci pelaburan yang akan dibuat untuk mendapatkan kelulusan pada asalnya tidak pernah wujud di dalam draf buku mesyuarat tetapi kemudiannya di dalam minit mesyuarat lembaga FELDA 304 Khas P100 pula ianya ada'. Persoalannya, bilakah perenggan 4 eksh. P100 ini dimasukkan dalam minit mesyuarat khas Bil 304 bertarikh 4 Julai 2013? Bagi merungkai keraguan mengenai isu ini, adalah amat penting rakaman audio pada tarikh mesyuarat tersebut dikemukakan sebagai ekshibit kes pendakwaan. Malangnya, ini gagal dikemukakan oleh pihak pendakwaan. Kegagalan mengemukakan keterangan dokumentar tersebut telah meruntuhkan kes pendakwaan. (perenggan 47-48)

(2) Kelemahan asas dalam kes pendakwaan ialah kegagalannya untuk mengemukakan bukti kritikal berkaitan mesyuarat Lembaga Pengarah FELDA. Kegagalan ini amat ketara berkaitan rakaman audio mesyuarat yang penting untuk kes itu. Terdapat bukti yang direkodkan yang boleh menjelaskan perbincangan dan keputusan sebenar yang dibuat oleh Lembaga Pengarah. Bagaimanapun, apabila ditekan untuk menghasilkan rakaman ini, setiausaha lembaga menyatakan itu telah dipadamkan atas 'sebab keselamatan'. Penjelasan ini tiada kredibiliti memandangkan kepentingan asas rekod mesyuarat Lembaga dalam tadbir urus korporat. Penyelenggaraan rekod yang tepat dan lengkap adalah amat penting untuk sesebuah organisasi seperti FELDA. Pemadaman tanpa penjelasan bukti penting sedemikian menimbulkan keraguan serius ke atas integriti kes pendakwaan. (perenggan 49)

(3) Kegagalan mengemukakan bukti utama, terutamanya apabila kewujudannya dibuktikan, menjejaskan kes pendakwaan dan menyokong versi pembelaan. Prinsip ini amat terpakai dalam kes ini kerana wujudnya dua set minit mesyuarat yang bercanggah untuk mesyuarat lembaga No 304 (khas). Perbandingan dua dokumen mendedahkan percanggahan yang ketara, terutamanya mengenai syarat yang dilampirkan pada kelulusan projek sturgeon. Perbezaan yang paling penting berkenaan syarat yang dikenakan oleh Lembaga Pengarah semasa meluluskan projek sturgeon. Percanggahan ini menimbulkan keraguan yang besar tentang ketepatan dan kebolehpercayaan versi pendakwaan. (perenggan 49)

(4) Kegagalan pihak pendakwaan untuk menghasilkan rakaman audio, yang pastinya akan menjelaskan perbincangan dan keputusan yang dibuat semasa syarat ke atas mesyuarat Lembaga Pengarah, membentuk jurang pembuktian yang teruk. Mengguna pakai prinsip dalam *Dato' Yap Peng v. PP*, inferens buruk harus dibuat terhadap pihak pendakwaan. Ketiadaan rakaman itu menyokong dakwaan tertuduh bahawa Lembaga sebenarnya telah memberikan kelulusan untuk projek sturgeon. Rakaman yang dipadam itu boleh mengesahkan sama ada Lembaga telah mengenakan projek itu atau memberikannya kelulusan tanpa kelayakan. (perenggan 49)

(5) Di mana bukti penting wujud yang secara muktamad boleh membuktikan kes pendakwaan tetapi tidak dikemukakan, tertuduh mesti diberi faedah keraguan. Ketidakupayaan pihak pendakwaan untuk menghasilkan rakaman audio mesyuarat Lembaga telah melucutkan bukti utama mahkamah yang boleh menyelesaikan versi bercanggah yang dikemukakan dalam perbicaraan. Oleh yang demikian, faedah keraguan mesti diberikan kepada tertuduh. (perenggan 49)

A **(6)** Pihak pendakwaan gagal membuktikan melampaui keraguan munasabah bahawa tertuduh telah bertindak secara tidak jujur. Kegagalan hakim perbicaraan untuk menganalisis dan mempertimbangkan dengan betul elemen penting kesalahan ini merupakan salah arah yang serius dalam undang-undang. Oleh itu, tiada merit dalam rayuan ini untuk
B mewajarkan mahkamah ini campur tangan dalam keseluruhan dapatan terperinci HMT. Keputusan Mahkamah Tinggi mengenepikan sabitan dan hukuman yang dibuat oleh Mahkamah Sesyen terhadap responden dikekalkan. (perenggan 49-51)

English *Headnotes*

C

The case was initiated at the Sessions Court against the two accused persons on two charges of criminal breach of trust, an offence under s. 409 of the Penal Code. One of the accused had since passed away ('deceased'). The deceased was the Deputy Director General (Strategic Resources) of FELDA while the respondent was the General Director of FELDA. In March 2013,
D the FELDA Board of Directors gave its approval for the establishment of FELDA Investment Corporation Sdn Bhd ('FIC') to carry out strategic investments. In order to realise the Prime Minister's wish for the country to enter the global sturgeon farming market, on 4 July 2013, the FELDA Board of Directors gave its approval in principle for FELDA to seek a source of
E income through farming projects. The FELDA's Board of Directors, through FELDA Minutes of Meeting, No 299 on 26 March 2013 presented two proposals, one for the establishment of FIC and the other for the establishment of a joint venture company with a Korean company, MMC Hassed Co Ltd. Both proposals were then brought to the FELDA Investment
F Committee. On 9 April 2013, the establishment of a joint venture company subject to due diligence the committee approved ('company feasibility study') were carried out against MMC Hassed Co Ltd, a response from the Malaysian Ambassador in South Korea to MMC Hassed Co Ltd and the findings of the feasibility study were presented again to the FELDA
G Investment Committee. The establishment of FIC was then approved. The deceased then went to Korea to carry out due diligence exercise. Subsequently, the Transformation Management Department evaluated the documents and the FELDA Legal Department had also evaluated the documents and prepared a draft joint venture agreement. On 2 July 2013, FIC was incorporated. On 4 July 2013, the FELDA Board of Directors held
H a Special Meeting No 304 (P100) and agreed to the joint venture of the sturgeon project. To facilitate the implementation of the sturgeon project, several subsidiaries had been incorporated. These included Capital Protocol Sdn Bhd (later named FIC), FELDA Korea Malaysia Sdn Bhd and FELDA Cariartive Sdn Bhd. The deceased and the respondent held positions as
I directors in these three subsidiaries. It was submitted that without the knowledge of the FELDA Board, after the sturgeon and caviar farming

project was implemented, the Transformation Department requested the Finance Department to process payment applications for the sturgeon and caviar farming project to be paid to the Korean company using FELDA funds through FELDA Korea Malaysia Sdn Bhd and FELDA Caviartive Sdn Bhd. Between 13 January 2014 and 23 July 2014, two payments were made through FELDA Caviartive Sdn Bhd. The first payment amounting to RM25,999,000 was made based on the Technology Transfer Agreement and Supply Agreement. While the second payment amounting to RM21,626,500 was made under the Design-Build Contract Agreement signed between FELDA Caviartive Sdn Bhd and 12C Hassed Co Ltd. The prosecution submitted that these two payments were made without the approval of the FELDA Board of Directors. The FELDA Board was said to have never approved the payments while the FELDA Board of Directors wanted a detailed study to be done and submitted for approval before the sturgeon project was implemented. The prosecution claimed that no study was done nor submitted for approval. On 29 September 2015, the FELDA Board of Directors was informed that a total of RM48,151,399.50 had been spent on sturgeon and caviar farming projects by FELDA Korea Malaysia Sdn Bhd and FELDA Caviartive Sdn Bhd which should have been done with prior obtained the approval of the FELDA Board. The money was said to have been illegally spent by the two companies without the approval of the Board. The amount also included the amount disposed of without the approval of the FELDA Board of Directors. The FELDA Board then decided not to proceed with the sturgeon and caviar farming project. The FELDA Board also ordered negotiations to be held with the Korean company to terminate the agreement that should not have been entered into by the respondent and the deceased, which allegedly did not protect FELDA's interests. On 2 February 2016, FELDA's Board of Directors decided to dissolve FELDA Korea Malaysia Sdn Bhd and FELDA Caviartive Sdn Bhd. On 2 August 2016, FELDA's Board of Directors was informed that based on FELDA's 2015 financial statements, FELDA suffered a net loss of RM1,053,239,013 in the statement of income ending 31 December 2015. As a result of the loss, the National Audit Department conducted an audit on the FELDA Group and found that there were four instructions of the FELDA Board that were not followed in the sturgeon and caviar farming project. Among them were poor monitoring, decisions of FELDA subsidiary companies were made at the level of the Board of Directors of subsidiary companies, there was no detailed study regarding feasibility and due diligence which was contrary to the manual and policy of the FELDA Group investment strategy as well as the establishment of FELDA subsidiary companies that did not have the approval of the Minister and the support of the Malaysian Finance Minister. The Sessions Court Judge found both accused persons guilty and convicted them of the charges. Aggrieved, the accused appealed to the High Court. The High Court Judge ('HCJ') allowed the appeals of the accused and set aside

A the conviction and sentence order made by the Sessions Court. Hence, this appeal against the entire order of the High Court. The main issue for determination was whether there was a need for the sturgeon and caviar project study to be presented again to the FELDA Board for approval.

Held (dismissing appeal)

B **Per Azmi Arifin JCA delivering the judgment of the court:**

(1) According to SP27's testimony, para. 4 of the Minutes of the Special Meeting No 304 (P100) stated that '(iv) Presentation to the Board a detailed study report of the investment that will be made to obtain approval originally never existed in the draft meeting book but later in
C the Minutes of the FELDA Board Meeting 304 Special P100 it is there'. The question was, when was para. 4 of exh. P100 included in the minutes of the Special Meeting No 304 dated 4 July 2013? In order to dispel doubts about this issue, it was very important that the audio recording on the date of the meeting be submitted as an exhibit of the
D prosecution's case. But unfortunately, this was not presented by the prosecution. The failure to present the documentary evidence had undermined the prosecution's case.

(2) A fundamental weakness in the prosecution's case was its failure to
E present critical evidence related to the FELDA Board of Directors meetings. This failure was particularly significant in relation to the audio recording of the meeting which was important to the case. There was recorded evidence that could explain the actual discussions and decisions made by the Board of Directors. However, when pressed to produce this recording, the Board secretary stated that it had been
F deleted for 'security reasons'. This explanation lacked credibility given the fundamental importance of Board meeting recordings in corporate governance. The maintenance of accurate and complete records was especially crucial for an organisation like FELDA. The unexplained deletion without clarification of important evidence raised serious
G doubts on the integrity of the prosecution's case.

(3) The prosecution's failure to present primary evidence, especially when its existence had been proven, affected the prosecution's case and supported the defence's version of the events. This principle was particularly applicable in this case because there were two conflicting
H sets of Minutes of Meetings for Board Meeting No 304 (Special). A comparison of the two documents revealed significant discrepancies, especially regarding the conditions attached to the approval of the sturgeon project. The most important difference concerned the conditions imposed by the Board of Directors when approving the
I sturgeon project. This discrepancy raised great doubts about the accuracy and reliability of the prosecution's version of the events.

(4) The prosecution's failure to produce the audio recordings, which would have definitively clarified the discussions and decisions made during the Board of Directors meeting, constituted a severe evidentiary gap. Applying the principles in *Dato' Yap Peng v. PP*, adverse inference should be made against the prosecution. The absence of the recordings supported the accused's claim that the Board had, in fact, granted approval for the sturgeon project. The deleted recordings could have confirmed whether the Board had imposed conditions on the project or granted it unqualified approval.

(5) Where crucial evidence exists, that could definitively establish the prosecution's case but is not produced, the accused must be given the benefit of the doubt. The prosecution's inability to produce the audio recording of the Board meeting deprived the court of key evidence that could have settled the conflicting versions presented at trial. As such, the benefit of the doubt must be given to the accused.

(6) The prosecution had failed to establish beyond reasonable doubt that the accused had acted dishonestly. The trial judge's failure to properly analyse and consider this crucial element of the offence constituted a serious misdirection in law. Therefore, there was no merit in this appeal to justify this court interfering with the entire detailed findings made by the HCJ. The decision of the High Court in setting aside the conviction and sentence handed down by the Sessions Court against the respondent was upheld.

Kes-kes yang dirujuk:
PP v. Datuk Hj Harun Hj Idris & Ors [1977] CLJU 92; [1977] 1 LNS 92 ***(dirujuk)***

Perundangan yang dirujuk:
Criminal Procedure Code, s. 422
Penal Code, ss. 109, 409

Bagi pihak perayu - Mohd Radzi Shah Ab Razak & Elyza Amira Habeeb Rahman; TPR
Bagi pihak responden - Sukri Hj Mohamed, Melissa Sukri, Syed Muhammad Syafiq Syed Abu Bakar & Che Mohd Azim Che Hamat; T/n Wan Haron Sukri & Nordin

[Editor's note: For the High Court judgment, please see Faizoull Ahmad v. PP & Other Appeals [2025] 6 CLJ 775 (affirmed).]

Dilaporkan oleh Suhainah Wahiduddin

PENGHAKIMAN

Azmi Ariffin HMR:

Mukadimah

[1] Pendakwaan terhadap kedua-dua tertuduh bermula di Mahkamah Sesyen Kuala Lumpur bagi dua pertuduhan-pertuduhan seperti yang berikut:

(i) dua pertuduhan terhadap Muhammad Sufi bin Mahbub (WA-62R-006-03-2017) adalah seperti yang berikut:

Pertuduhan Pertama

Bahawa kamu, di antara 13.01.2014 hingga 23.07.2014 di Bangunan Wisma Lembaga Kemajuan Tanah Persekutuan (FELDA), Jalan Perumahan Gurney, dalam Wilayah Persekutuan Kuala Lumpur, sebagai ejen, iaitu Timbalan Pengarah Besar Sumber Strategik FELDA dan di dalam kapasiti tersebut diamanahkan dengan penguasaan ke atas dana FELDA, telah melakukan pecah amanah jenayah ke atas dana tersebut, di mana kamu telah dengan curangnya melupuskan wang tersebut dengan memasuki Perjanjian "Technology Transfer and Supply Agreement (TTSA)" dengan I2C Hassed Co. Ltd (No. Syarikat: 110111-4680199) melalui FELDA Caviartive Sdn Bhd (No. Syarikat: 1076691-K) dan meluluskan pembayaran berjumlah RM25,999,000.00 tanpa kelulusan Lembaga Pengarah FELDA. Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 409 Kanun Keseksaan [Akta 574] dan boleh dihukum di bawah seksyen yang sama.

Pertuduhan Kedua

Bahawa kamu, di antara 31.3.2014 hingga 23.07.2014 di Bangunan Wisma Lembaga Kemajuan Tanah Persekutuan (FELDA), Jalan Perumahan Gurney, dalam Wilayah Persekutuan Kuala Lumpur, sebagai ejen, iaitu Timbalan Pengarah Besar Sumber Strategik FELDA dan di dalam kapasiti tersebut diamanahkan dengan penguasaan ke atas dana FELDA, telah melakukan pecah amanah jenayah ke atas dana tersebut, di mana kamu dengan curangnya melupuskan wang tersebut dengan memasuki Perjanjian "Design-Build Contract Agreement (DBCA)" dengan I2C Hassed Co. Ltd (No. Syarikat: 1061918 - U) melalui FELDA Caviartive Sdn Bhd (No. Syarikat: 1076691 - K) dan meluluskan pembayaran berjumlah RM21,626,500.00 tanpa kelulusan Lembaga Pengarah FELDA. Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 409 Kanun Keseksaan [Akta 574] dan boleh dihukum di bawah seksyen yang sama.

(ii) dua pertuduhan terhadap Faizoull bin Ahmad (WA-62R-005-03-2017) adalah seperti yang berikut:

Pertuduhan Pertama

Bahawa kamu, di antara 13 Januari 2014 hingga 23 Julai 2014 di Bangunan Wisma Lembaga Kemajuan Tanah Persekutuan (FELDA), Jalan Perumahan Gurney, dalam Wilayah Persekutuan Kuala Lumpur, telah bersubahat dengan Muhammad Sufi Bin Mahbub [No. K/P: 640724-01-5941] untuk melakukan pecah amanah jenayah berkenaan dengan dana FELDA berjumlah

RM25,999,000 di mana Muhammad Sufi telah diamanahkan dengan penguasaan ke atas dana tersebut dalam menjalankan tugasnya sebagai Timbalan Pengarah Besar Sumber Strategik FELDA, di mana kesalahan pecah amanah jenayah tersebut dilakukan atas sebab-sebab persubahatan kamu dan oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 109 Kanun Keseksaan [Akta 574] yang dibaca bersama dengan seksyen 409 Kanun yang sama.

Pertuduhan Kedua

Bahawa kamu, di antara 31 Mac 2014 hingga 23 Julai 2014 di Bangunan Wisma Lembaga Kemajuan Tanah Persekutuan (FELDA),Jalan Perumahan Gurney, dalam Wilayah Persekutuan Kuala Lumpur, telah bersubahat dengan Muhammad Sufi Bin Mahbub [No. K/P: 640724-01-5941] untuk melakukan pecah amanah jenayah berkenaan dengan dana FELDA berjumlah RM21,626,500 di mana Muhammad Sufi telah diamanahkan dengan penguasaan ke atas dana tersebut dalam menjalankan tugasnya sebagai Timbalan Pengarah Besar Sumber Strategik FELDA, di mana kesalahan pecah amanah jenayah tersebut dilakukan atas sebab-sebab persubahatan kamu dan oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 109 Kanun Keseksaan [Akta 574] yang dibaca bersama dengan seksyen 409 Kanun yang sama.

[2] Kedua-dua tertuduh tidak mengaku bersalah terhadap pertuduhan-pertuduhan ini dan memohon untuk dibicarakan. Seramai 49 orang saksi pendakwaan telah dipanggil untuk memberikan keterangan. Perbicaraan berjalan secara bersama.

[3] Di akhir kes pendakwaan, pada 16 Mac 2018, Hakim Mahkamah Sesyen yang bijaksana mendapati pihak pendakwaan telah berjaya membuktikan suatu kes *prima facie* terhadap kedua-dua tertuduh dan memanggil mereka untuk membela diri.

[4] Kedua-dua mereka memilih untuk memberi keterangan secara bersumpah dari pada kandang saksi.

[5] Pada akhir kes pembelaan, Hakim Mahkamah Sesyen yang bijaksana mendapati kedua-dua tertuduh bersalah dan disabitkan terhadap pertuduhan-pertuduhan tersebut.

[6] Tertuduh pertama telah dikenakan hukuman pemenjaraan selama lima tahun dari tarikh jatuh hukum (8 Jun 2018). Hukuman pemenjaraan bagi kedua-dua pertuduhan berjalan serentak.

[7] Tertuduh kedua telah dikenakan hukuman pemenjaraan selama dua tahun dari tarikh jatuh hukum (8 Jun 2018). Hukuman pemenjaraan bagi kedua-dua pertuduhan berjalan serentak.

[8] Terkilan dengan keputusan tersebut, kedua-dua tertuduh telah memfailkan notis rayuan ke Mahkamah Tinggi Kuala Lumpur secara berasingan terhadap sabitan dan hukuman tersebut.

[9] Tidak berpuas hati dengan tempoh hukuman yang dijatuhkan, Pendakwa Raya turut memfailkan rayuan balas terhadap hukuman terhadap kedua-dua tertuduh.

[10] Semasa pendengaran rayuan di Mahkamah Tinggi, Muhammad Sufi bin Mahbub (si mati) telah meninggal dunia dan hanya rayuan terhadap Faizoull bin Ahmad sahaja yang diteruskan. Rayuan si mati terhadap sabitan dan hukuman, serta rayuan balas Pendakwa Raya terhadap hukuman ditarik balik dan dibatalkan.

[11] Pada 22 September 2022, Hakim Mahkamah Tinggi yang bijaksana telah membenarkan rayuan perayu dan mengenepikan perintah sabitan dan hukuman yang dibuat oleh Mahkamah Sesyen.

[12] Tidak berpuas hati dengan keputusan tersebut, pada 6 Oktober 2022, Pendakwa Raya telah memfailkan satu notis rayuan ke Mahkamah Rayuan Malaysia terhadap keseluruhan perintah yang dibuat oleh Mahkamah Tinggi.

Fakta Kes

[13] Muhammad Sufi bin Mahbub (si mati) adalah merupakan Timbalan Ketua Pengarah (Sumber Strategik) FELDA manakala responden pula merupakan Pengarah Besar FELDA.

[14] Responden dan si mati juga memegang jawatan-jawatan berikut:

(i) Ahli Lembaga Pengarah Capital Protocol Sdn Bhd (kemudiannya dikenali sebagai FELDA Investment Corporation Sdn Bhd);

(ii) Ahli Lembaga Pengarah FELDA Korea Malaysia Sdn Bhd; dan

(iii) Ahli Pengarah FELDA Caviartive Sdn Bhd.

[15] Pada bulan Mac 2013, Lembaga Pengarah FELDA telah memberikan kelulusan bagi penubuhan FELDA Investment Corporation Sdn Bhd ("FIC"). Entiti ini diwujudkan sebagai sebuah syarikat tujuan khas (special purpose vehicle) untuk melaksanakan pelaburan strategik, dan untuk menjayakan misi itu, Lembaga Pengarah FELDA telah memperuntukkan kepada FIC wang permulaan modal berbayar sebanyak RM500 juta.

[16] Lembaga Pengarah FELDA juga memberi kuasa kepada Ahli Lembaga Pengarah FIC untuk meluluskan secara bebas pelaburan bernilai RM100 juta dan ke bawah. Namun begitu, bagi apa-apa pelaburan yang melebihi had yang telah ditetapkan, FIC perlu mendapatkan kelulusan daripada Lembaga Pengarah FELDA.

[17] Disebabkan penyenaraian FELDA Global Ventures Holdings Berhad ("FGV"), FELDA tahu bahawa mereka perlu mencari pelaburan dengan pulangan yang tinggi dengan kadar segera bagi mengelakkan FELDA mengalami aliran tunai yang negatif.

[18] Disebabkan penyenaraian FGV juga, FELDA akan kehilangan pendapatan purata sebanyak RM2 bilion setahun, kepada jangkaan pendapatan keseluruhan lebih kurang RM400 juta setahun, yang merangkumi lebih kurang RM248.48 juta setahun hasil daripada pajakan tanah mereka dan RM156.02 juta setahun dari perkongsian keuntungan perniagaan mereka setahun, dimana ianya merupakan terlampau jauh berbeza apabila dibandingkan dengan purata pendapatan RM2 bilion setahun sebelum itu.

[19] Untuk merealisasikan hasrat Perdana Menteri supaya negara ini memasuki pasaran global penternakan ikan sturgeon, maka pada 4 Julai 2013, Lembaga Pengarah FELDA telah memberikan kelulusan secara dasar kepada FELDA untuk mencari sumber pendapatan melalui projek penternakan ini.

[20] Sedikit latar belakang mengenai projek penternakan ikan sturgeon ini, ianya bermula apabila Lembaga Pengarah FELDA melalui minit mesyuarat FELDA Bil 299 pada 26 Mac 2013 (P350) dimana dua cadangan telah dibentangkan, satu untuk penubuhan FIC dan satu lagi adalah untuk penubuhan syarikat usahasama bersama dengan syarikat Korea, MMC Hassed Co Ltd.

[21] Lembaga Pengarah FELDA kemudiannya memutuskan supaya cadangan penubuhan FIC dan syarikat usahasama bersama pihak Korea dibawa kepada Jawatankuasa Pelaburan FELDA.

[22] Kedua-dua cadangan tersebut kemudiannya telah dibawa kepada Jawatankuasa Pelaburan FELDA. Pada 9 April 2013, mesyuarat (P337) meluluskan penubuhan syarikat usahasama tertakluk kepada 'due diligence' ("kajian kebolehlaksanaan syarikat") dibuat terhadap syarikat MMC Hassed Co Ltd, maklum balas daripada Duta Malaysia di Korea Selatan ke atas MMC Hassed Co Ltd dan penemuan kajian kebolehlaksanaan dibentangkan semula kepada Jawatankuasa Pelaburan FELDA. Penubuhan FIC kemudiannya telah diluluskan.

[23] Pada 28 Mei 2013, Lembaga Pengarah FELDA Bil 302 (P338) telah memutuskan supaya penubuhan FIC dipercepatkan kerana ianya akan digunakan sebagai syarikat pegangan utama untuk pelaburan-pelaburan FELDA.

[24] Lembaga Pengarah FELDA Bil 302 (P338) juga mencadangkan agar syarikat usahasama ini dibentangkan kepada Jawatankuasa Pelaburan FELDA Bil 2 (P337).

[25] Si mati kemudiannya telah pergi ke Korea untuk menjalankan 'due diligence'. Lanjutan daripada itu, Jabatan Pengurusan Transforvasi telah menilai dokumen-dokumen yang diterima dan Jabatan Undang-undang FELDA juga telah menilai dokumen-dokumen tersebut dan menyediakan draf perjanjian usahasama.

[26] Pada 2 Julai 2013, FIC diperbadankan (P39).

[27] Lembaga Pengarah FELDA di dalam mesyuaratnya pada 25 Jun 2013 (P319) mencapai persetujuan berikut:

> Dipersetujui:
>
> (vii) Ahli Lembaga FELDA memberi mandat kepada kepada Ahli Lembaga FIC dalam membuat keputusan pelaburan yang melibatkan projek yang bernilai RM100 juta ke bawah.

[28] Pada 4 Julai 2013 Lembaga Pengarah FELDA telah mengadakan mesyuarat khas Bil 304 (P100) dan mempersetujui usahasama projek sturgeon seperti yang berikut:

> Dipersetujui:
>
> (i) Meluluskan perlaksanaan projek ini menggunakan syarikat tujuan khas FIC di bawah kluster pelaburan "Food & Wellness".
>
> (ii) Memberi mandat kepada Pengarah Besar FELDA atau ahli lembaga pengarah syarikat tujuan khas (FIC) tersebut untuk melaksanakan projek ini melalui perjanjian persefahaman (MOU) dengan MMC Hassed Co Ltd (Korea).
>
> (iii) Meluluskan penubuhan syarikat usahasama bersama MMC Hassed Co Ltd untuk melaksanakan projek penghasilan telur ikan sturgeon (caviar) tersebut.
>
> (iv) Bentangkan kepada Lembaga laporan kajian terperinci pelaburan yang akan dibuat untuk mendapatkan kelulusan.

[29] Bagi memudahkan pelaksanaan projek sturgeon ini, beberapa anak syarikat telah diperbadankan. Ini termasuklah Capital Protokol Sdn Bhd (kemudian dinamakan FIC), FELDA Korea Malaysia Sdn Bhd dan FELDA Cariartive Sdn Bhd. Si mati dan responden memegang jawatan sebagai pengarah di dalam ketiga-tiga anak syarikat ini.

[30] Dikatakan bahawa tanpa pengetahuan Lembaga FELDA, selepas projek penternakan ikan sturgeon dan kaviar dilaksanakan, Jabatan Transforvasi telah memohon Jabatan Kewangan memproses permohonan bayaran untuk projek penternakan ikan sturgeon dan kaviar, untuk dibayar kepada pihak Korea menggunakan dana FELDA melalui FELDA Korea Malaysia Sdn Bhd dan FELDA Caviartive Sdn Bhd.

[31] Di antara 13 Januari 2014 dan 23 Julai 2014, dua pembayaran telah dibuat melalui FELDA Caviartive Sdn Bhd. Bayaran pertama berjumlah RM25,999.000 dibuat berdasarkan perjanjian 'Technology Transfer and

Supply Agreement' (P95). Manakala, bayaran kedua berjumlah RM21,626,500 dibuat di bawah perjanjian 'Design-Build Contract Agreement' (P96) yang ditandatangani di antara FELDA Caviartive Sdn Bhd dan I2C Hassed Co Ltd.

[32] Pihak pendakwaan mengatakan bahawa kedua-dua bayaran ini dibuat tanpa mendapat kelulusan Lembaga Pengarah FELDA. Lembaga FELDA dikatakan tidak pernah meluluskan bayaran-bayaran tersebut sedangkan Lembaga Pengarah FELDA mahukan kajian terperinci dibuat dan dikemukakan untuk kelulusan sebelum projek sturgeon dilaksanakan. Pihak pendakwaan mendakwa tiada kajian dibuat atau dikemukakan untuk kelulusan.

[33] Pada 29 September 2015, Lembaga Pengarah FELDA dimaklumkan bahawa sejumlah RM48,151,399.50 telah dibelanjakan untuk projek penternakan ikan sturgeon dan kaviar oleh FELDA Korea Malaysia Sdn Bhd dan FELDA Caviartive Sdn Bhd yang sepatutnya perlu mendapatkan kelulusan Lembaga FELDA terlebih dahulu. Wang tersebut dikatakan telah dibelanjakan secara tidak sah oleh kedua-dua syarikat tersebut tanpa kelulusan Lembaga. Jumlah tersebut juga merangkumi jumlah yang dilupuskan tanpa kelulusan Lembaga Pengarah FELDA.

[34] Lembaga FELDA kemudiannya memutuskan untuk tidak meneruskan projek penternakan ikan sturgeon dan kaviar. Lembaga FELDA juga mengarahkan rundingan dibuat dengan pihak Korea bagi menamatkan perjanjian yang tidak sepatutnya dimasuki oleh responden dan si mati yang dikatakan tidak melindungi kepentingan FELDA.

[35] Pada 2 Februari 2016, Lembaga Pengarah FELDA memutuskan FELDA Korea Malaysia Sdn Bhd dan FELDA Caviartive Sdn Bhd dibubarkan. Pada 2 Ogos 2016, Lembaga Pengarah FELDA dimaklumkan bahawa berdasarkan kepada penyata kewangan FELDA tahun 2015, FELDA mengalami kerugian bersih sebanyak RM1,053,239,013 bagi penyata pendapatan berakhir 31 Disember 2015.

[36] Akibat daripada kerugian tersebut, Jabatan Audit Negara telah menjalankan audit ke atas Kumpulan FELDA dan mendapati terdapat empat arahan Lembaga FELDA yang tidak dipatuhi dalam projek penternakan ikan sturgeon dan kaviar tersebut. Antaranya pemantauan yang lemah, keputusan syarikat subsidiari FELDA dibuat di peringkat Lembaga Pengarah syarikat subsidiari, tiada kajian terperinci berkenaan dengan 'feasibility' dan 'due diligence' yang bertentangan dengan manual dan dasar strategi pelaburan Kumpulan FELDA serta penubuhan syarikat subsidiari FELDA yang tidak mendapat kelulusan Menteri dan sokongan Menteri Kewangan Malaysia.

A **Ringkasan Pembelaan Responden**

[37] Projek sturgeon dan kaviar dibincangkan dalam mesyuarat bersama YAB Perdana Menteri dan ianya berpandukan kepada eksh. D385 dan D286.

[38] Selanjutnya Lembaga Pengarah FELDA telah memberi kuasa kepada
B Lembaga Pengarah FIC untuk meluluskan projek sturgeon dan kaviar mengikut minit mesyuarat Lembaga FELDA 303 (P319) dan Jawatankuasa Pelaburan FELDA Bilangan 3/2013 (P339).

[39] Pihak Lembaga Pengarah FELDA telah meluluskan tanpa syarat projek sturgeon di dalam mesyuarat Lembaga FELDA Bilangan 304 (Khas)
C pada 4 Julai 2013 (P100).

[40] Keputusan sebenar Lembaga FELDA tentang projek sturgeon adalah seperti di dalam syor dalam P101.

[41] Projek sturgeon telah diluluskan berdasarkan minit mesyuarat
D Lembaga FELDA Bilangan 303 bertarikh 25 Jun 2013 (P319) dan minit mesyuarat Lembaga Pengarah Capital Protocol Sdn Bhd. bertarikh 11 Julai 2013 (P99) dan selanjutnya laporan terperinci (P325) tidak perlu dibentangkan untuk kelulusan Lembaga Pengarah FELDA. Projek sturgeon telah diluluskan berdasarkan kelulusan Lembaga Pengarah FELDA ke atas
E bajet sturgeon menurut minit mesyuarat Lembaga FELDA Bilangan 311 dan 313.

[42] SD6 telah memberi keterangan bahawa laporan terperinci projek sturgeon telah dibentangkan oleh si mati semasa mesyuarat khas Lembaga Pengarah FELDA Bilangan 304 (Khas) P100.

F **Dapatan Hakim Mahkamah Sesyen Di Akhir Kes Pembelaan**

[43] Di antara lain dapatan beliau (Kandungan 16 Rekod Rayuan Jilid 2(1) di ms. 73-75 adalah seperti yang berikut dan kami petik:

> Pihak pembela dan pembelaan termasuk semua bentuk dokumen yang
> G diberikan oleh OKT 1 dan OKT 2 adalah pembelaan penafian semata-mata. Antara pembelaan OKT 1 bahawa beliau telah membentangkan laporan terperinci pada Mesyuarat Lembaga FELDA Bilangan 304 (Khas) pada 4.7.2013 dan disokong oleh SD6. Mahkamah mendapati pembelaan OKT 1 ini tidak konsisten dan selaras dengan dokumen minit mesyuarat 304 (Khas) P100 di mana ia catatkan (3) dipersetujui (iv) bentangkan
> H kepada Lembaga laporan kajian terperinci pelaburan yang akan dibuat untuk mendapatkan kelulusan.
>
> Sedangkan di dalam mesyuarat Lembaga FELDA berikutnya pada tarikh 22.10 2013 Bilangan 308 mencatatkan Minit Mesyuarat 304 (Khas) (eksibit P100) telah disahkan dan diluluskan dan tiada sebarang bantahan atau
> I ulasan atas minit P100 tersebut. Dan di dalam Akta Keterangan prinsip yang mantap keterangan lisan tidak boleh mengubah apa yang telah dicatat dalam dokumen.

Selanjutnya keterangan OKT 1 bahawa saksi SP42 Datuk Dr. Omar Bin Salim selaku Pegawai Seliaan FELDA dan Pengarah Lembaga FELDA dituduh mengubah Minit Lembaga FELDA Bilangan 304 (Khas) adalah rekaan semata-mata kerana kesemua ahli Lembaga FELDA telah meluluskan dan mengesahkan minit P100 tanpa sebarang bantahan.

Apa yang jelas pihak Lembaga FELDA ada memberikan kelulusan bersyarat seperti dicatat di P100 dan mensyaratkan bahawa laporan kajian terperinci perlu dibentangkan untuk mendapat kelulusan. Begitu juga tentang bajet yang diluluskan tetapi ia perlu dibentangkan semula kepada Lembaga FELDA untuk mendapat kelulusan.

Pembelaan OKT 2. la antara lain berkisar projek penternakan ikan sturgeon ini telah dibincangkan dalam mesyuarat bersama YAB Perdana Menteri. Selanjutnya Lembaga FELDA telah memberikan kuasa pada FIC (FELDA Investment Corporation) meluluskan projek sturgeon dan kaviar ini.

Seterusnya kajian projek sturgeon dan kaviar ini tidak perlu dibentangkan pada Lembaga FELDA.

Pembelaan OKT 2 adalah penafian semata-mata. Projek penternakan ikan sturgeon ini perlu dibentangkan kajian terperinci seperti yang diarah dan dicatat dalam Minit Mesyuarat Lembaga FELDA (Khas) Bilangan 304 yang telah ditandakan sebagai P100. Berkenaan kuasa FELDA Investment Corporation (FIC) meluluskan projek sturgeon dan kaviar ini, keseluruhan projek ini bernilai melebihi RM100 juta. Oleh itu Lembaga FELDA perlu meluluskannya kerana ia melebihi nilai RM100 juta.

Isu berkenaan pembelaan penafian semata-mata 'bare denial'.

Pihak pembela dan pembelaan OKT 1 dan OKT 2 telah gagal mematahkan anggapan di bawah Seksyen 409 B(1)(b)(ii) dibawah Kanun Keseksaan di bawah imbangan kebarangkalian.

Pembelaan dan pihak pembela OKT1 dan OKT2 telah gagal menimbulkan keraguan menasabah atas kes pendakwaan. Dan pihak pendakwaan telah berjaya membuktikan kes terhadap OKT 1 dan OKT 2 melampaui tahap keraguan munasabah.

Dengan itu tertuduh OKT 1 dan OKT2 telah didapati bersalah dan disabitkan kesalahannya atas kesemua pertuduhan tersebut oleh mahkamah. Dan selanjutnya pihak mahkamah telah menjatuhkan hukuman terhadap OKT1 dan OKT 2 atas kesalahan yang telah mereka dituduhkan.

Dapatan Hakim Mahkamah Tinggi Di Akhir Kes Pembelaan

[44] Di antara dapatan lain beliau (Kandungan 16 Rekod Rayuan Jilid 1(1) di ms. 15-43) adalah seperti yang berikut dan kami petik:

A Analysis and findings

Ingredients of abetment

[22] Before delving into the specific issues of this appeal, it is essential to examine the ingredients of the offence of abetment.

B Section 107 of the Penal Code defines abetment as follows:

Abetment of a thing

107. A person abets the doing of a thing who –

(a) instigates any person to do that thing;

C (aa) commands any person to do that thing;

(b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

D (c) intentionally aids, by any act or illegal omission, the doing of that thing.

[23] It is pertinent to observe that under section 107 of the Penal Code, the criminal act attributed to an accused charged with the offence of abetment need not necessarily be identical to the act constituting the E principal offence. The crucial requirement is the existence of a causal connection between the act of abetment and the commission of the principal offence.

[24] Therefore, to secure a conviction under section 109 read together with section 409 of the Penal Code in the present appeal, the prosecution F bore the burden of proving, beyond reasonable doubt, the following essential elements:

(a) that the principal offence of criminal breach of trust under section 409 of the Penal Code was committed by Muhammad Sufi;

(b) that the appellant either instigated, commanded, conspired with, or G intentionally aided Muhammad Sufi in the commission of the principal offence; and

(c) that the principal offence was committed as a direct consequence of the appellant's act of abetment.

Failure of the trial judge to make distinct findings on abetment

H

[25] With respect, a critical and fundamental error in the trial judge's approach was his failure to make distinct findings regarding the elements of abetment against the appellant. A careful reading of the trial judge's grounds of judgment reveals that he erroneously proceeded on the premise that both Muhammad Sufi and the appellant were charged with I the same offence of criminal breach of trust under section 409 of the Penal Code. This flawed approach resulted in a misdirection in law.

[26] In his analysis, the trial judge assessed the evidence in respect of the charges against the appellant together with his analysis of the charges against Muhammad Sufi, as if both were charged with the same principal offence. This approach fundamentally misapprehended the nature of the charges against the appellant which were for abetment under section 109 of the Penal Code, not for the principal offence under section 409.

…

[28] The trial judge's failure to make distinct findings on the specific mode of abetment, whether by instigation, command, conspiracy, or intentional aid, constituted a serious misdirection.

This misdirection deprived the appellant of the opportunity to adequately address the precise allegations against him during his defence. The lack of specificity in the findings further hindered the appellant's ability to challenge the prosecution's case effectively.

…

[30] In the present appeal, the trial judge not only failed to make specific findings on abetment but also conflated the analysis of the appellant's case with that of Muhammad Sufi. By treating both as if they were charged with the same offence, the trial judge fundamentally misconceived the legal principles applicable to abetment.

[31] This erroneous approach was deeply flawed. The elements of abetment under section 109 read with section 107 of the Penal Code are legally distinct from the elements of the principal offence under section 409. The failure to make separate findings on the elements of abetment resulted in a miscarriage of justice. By not delineating which specific acts of abetment the appellant was found to have committed, the trial judge deprived the appellant of his right to a fair trial. This omission created uncertainty in the findings and undermined the appellant's ability to present a proper defence.

Misdirection in the trial judge's approach

[32] A thorough examination of the trial judge's grounds of judgment reveals multiple serious misdirections that necessitate appellate intervention. These misdirections are not minor irregularities but instead go to the very core of the case, affecting the fairness of the proceedings and the validity of the conviction.

[33] First, as previously highlighted, the trial judge erroneously treated the appellant and Muhammad Sufi as though they were charged with the same offence of criminal breach of trust under section 409 of the Penal Code. This fundamental misunderstanding permeated the entire judgment. The trial judge failed to distinguish between the elements required to establish the principal offence and those necessary to prove abetment. As a result, he erroneously applied the same legal analysis to both accused thereby distorting the proper legal basis applicable to the appellant's charges.

A [34] Second, the trial judge failed to determine which specific mode of abetment under section 107 of the Penal Code was supported by the evidence, whether it was by instigation, command, conspiracy, or intentional aid. Each mode of abetment contains distinct legal elements that must be established beyond reasonable doubt. The failure to make such a determination constituted a serious misdirection as it deprived the B appellant of the opportunity to effectively address the allegations against him and mount a proper defence.

[35] Third, the trial judge failed to conduct a proper evaluation of the defence evidence. He summarily dismissed much of the defence's case as "bare denial" without providing a reasoned analysis of its merits.

C …

[37] The misdirections in the present case are so fundamental that they cannot be cured by invoking section 422 of the Criminal Procedure Code. Section 422 of the Criminal Procedure Code empowers an appellate court to uphold a conviction despite the presence of errors, omissions, D irregularities, *etc*., if the court is satisfied that no substantial miscarriage of justice has occurred.

However, in the present appeal I found the errors committed by the learned trial judge were so severe that they vitiated the entire proceedings rendering the conviction unsafe.

E …

[39] In the present case, the misdirections committed by the trial judge were so serious that they resulted in a substantial miscarriage of justice.

[40] On the contrary, as will be further elaborated, the prosecution's case suffered from significant deficiencies in proving the essential elements of F abetment. Therefore, the exceptional circumstances that would justify upholding a conviction despite legal misdirections, as outlined in *Tunde Apatira* (*supra*) are not present in the present appeal. Respectfully, I find the cumulative effect of the trial judge's errors renders the conviction unsafe and unsustainable in law.

G Failure to prove the ingredients of abetment

[41] The prosecution's case against the appellant for abetment under section 109 read with section 409 of the Penal Code suffered from significant deficiencies. These deficiencies were particularly evident in the prosecution's failure to establish the essential elements of abetment as H defined under section 107 of the Penal Code.

[42] The necessary elements to constitute abetment as defined under section 107 of the Penal Code are well established. Traditionally, the three elements are instigation, conspiracy and intentionally aiding.

…

I

[44] In June 2012, section 107 of the Penal Code was amended to include the element of "command" under the new paragraph (aa). In my considered view, the concept of abetment through the act of commanding another individual to commit the principal offense was established to address circumstances in which persons, particularly those in positions of authority or leadership, instigate, direct, or order others to engage in criminal conduct. This provision is intended to ensure accountability for individuals who orchestrate or facilitate criminal activities through subordinates, thereby preventing masterminds or leaders of criminal organisations from evading legal responsibility solely on the basis that they did not personally execute the unlawful acts but instead exercised their authority to compel others to do so.

Abetment by instigation

[45] In the present appeal, the evidence of PW26 directly contradicted the prosecution's claim that the appellant instigated Muhammad Sufi to commit criminal breach of trust. PW26 testified unequivocally that the appellant never issued direct instructions concerning payment applications or project implementation. PW26 further stated that the implementation of the project was overseen by Muhammad Sufi through the Transformation Unit with minimal involvement from the appellant. This testimony did not support the prosecution's theory of instigation and cast serious doubt on the appellant's alleged role in prompting or encouraging the commission of the offence.

Abetment by command

[46] To establish abetment by command under section 107(aa) of the Penal Code, the prosecution was required to prove that the accused held a position of authority and used that authority to direct or instruct the principal offender to commit the offence.

[47] In the present case, although the appellant occupied a superior hierarchical position to Muhammad Sufi within FELDA's organisational structure, the prosecution failed to prove that the appellant commanded Muhammad Sufi to commit criminal breach of trust. The testimony of PW26 was particularly significant in this regard. PW26 confirmed under cross-examination that the appellant never issued direct instructions to Muhammad Sufi concerning the specific payments or transactions that formed the basis of the criminal breach of trust charges. Instead, PW26 testified that project implementation was largely handled autonomously by Muhammad Sufi through the Transformation Unit. This testimony directly negated any supposition that the appellant exercised authoritative control over the commission of the alleged offence.

[48] Furthermore, the evidence demonstrated that the payments in question were processed through FELDA's established financial procedures involving multiple levels of approval and oversight procedures. There was no evidence to demonstrate any possibility that the payments resulted from direct commands issued by the appellant to Muhammad Sufi.

Abetment by conspiracy

[49] To establish abetment by conspiracy under section 107(b) of the Penal Code, the prosecution bore the burden of proving an agreement or common intention between the appellant and Muhammad Sufi to commit criminal breach of trust. In *Datuk Haji Harun Bin Haji Idris* (*supra*), the court held that conspiracy requires proof of a combination and agreement between two or more individuals to engage in an illegal act or to achieve an illegal purpose through unlawful means.

[50] In the present appeal, the prosecution failed to adduce any direct evidence of an agreement or common intention between the appellant and Muhammad Sufi to misappropriate FELDA's funds. No witness testified to the existence of any conversation, communication or meeting where such an agreement was reached. The mere fact that both the appellant and Muhammad Sufi were directors of the relevant companies did not, in itself, establish a conspiracy. The prosecution's reliance on their positions as directors was speculative and did not satisfy the legal threshold required to prove abetment by conspiracy beyond reasonable doubt.

Abetment by intentional aid

[51] To establish abetment by intentional aid under section 107(c) of the Penal Code, the prosecution was required to prove that the appellant knowingly and deliberately assisted Muhammad Sufi in committing criminal breach of trust. In *Faguna Kanta Nath v. State of Assam* AIR 1959 SC 673; [1959] SC 673, the court held that mere presence or awareness of an offence is insufficient to establish abetment by intentional aid. The accused must have actively participated in facilitating the commission of the offence.

[52] The prosecution's case primarily relied on the appellant's signing of the TTSA and DBCA agreements. However, the evidence demonstrated that these agreements were reviewed and vetted by FELDA's legal department, as confirmed by PW48, and by external legal counsel, PW46 and PW47. PW48 testified that the agreements were subjected to proper legal scrutiny before execution. This evidence indicates that the appellant signed the agreements in reliance on professional legal advice rather than with any intention to aid Muhammad Sufi in committing criminal breach of trust. The prosecution failed to disprove this reasonable explanation.

[53] Furthermore, the prosecution failed to prove that the appellant was aware of any intention on Muhammad Sufi's part to commit criminal breach of trust and that he deliberately assisted in its commission. In *Loh Liang Gun* (*supra*), the Court of Appeal emphasised that for abetment by intentional aid, the prosecution must establish that the accused had knowledge of the principal offender's intent to commit the offence and took deliberate actions to facilitate it.

[54] In the present appeal, the evidence suggested that the appellant acted within his authority and in good faith to implement Board-approved projects. PW26 testified that the appellant consistently sought legal advice

and adhered to established procedures concerning the Sturgeon Project. This testimony contradicted the prosecution's assertion that the appellant knowingly and intentionally aided Muhammad Sufi in committing criminal breach of trust. The evidence, instead, indicated that the appellant acted in accordance with his official duties and in reliance on legal and procedural guidance.

[55] Additionally, for abetment under section 107 of the Penal Code to be established, the prosecution was required to prove that the principal offence was committed as a direct consequence of the alleged abetment. In the present case, the evidence did not demonstrate a causal link between the appellant's actions and Muhammad Sufi's alleged commission of criminal breach of trust. The payments in question were processed through established approval procedures within FELDA, involving multiple levels of oversight procedures. This evidence suggested that the payments were part of routine business operations and were not the result of any abetment by the appellant.

[56] In light of these significant evidentiary deficiencies, I found the prosecution failed to establish beyond reasonable doubt that the appellant had committed abetment under section 109 read with section 409 of the Penal Code. The trial judge's failure to properly analyse and consider these essential elements of abetment constituted a serious misdirection in law.

Failure to consider the defence evidence

[57] A further fundamental flaw in the trial judge's approach was his failure to properly assess and consider the defence evidence. In my considered view, the evidence presented by the defence raised reasonable doubt as to the appellant's guilt. However, the trial judge appeared to summarily dismiss much of the defence's case as a bare denial without engaging in a proper analysis. This constituted a serious misdirection in law.

[58] The appellant's primary defence was that he acted in good faith and within the scope of his authority as the Director-General of FELDA. He asserted that his actions were in furtherance of the Sturgeon Project which had been approved in principle by the FELDA Board. He contended that the Board's approval, as recorded in Minutes No. 304 (Special) dated 04.07.2013, authorised him to proceed with the project. Based on this approval, he argued that he was empowered to enter into the necessary agreements and facilitate the required payments.

[59] Several defence witnesses, including DW6, a former Director-General of FELDA who had attended the relevant Board meeting, testified that comprehensive presentations were made regarding the Sturgeon Project. These witnesses further testified that the Board had granted its approval for the project. This testimony directly contradicted the prosecution's assertion that the project had not received proper Board approval.

A [60] Despite the significance of this testimony, the learned trial judge dismissed it without conducting a proper evaluation. The failure to assess the credibility and weight of independent witness testimony is a serious legal error. In *Dato' Yap Peng* (*supra*) the Federal Court held that evidence provided by independent witnesses who have no personal interest in the case must be carefully examined and given due consideration. The trial B judge's failure to properly assess the testimony of DW6 and other defence witnesses amounted to a serious misdirection that materially prejudiced the appellant's case.

[61] Additionally, the appellant adduced evidence demonstrating that the FELDA Board was regularly updated on the progress of the Sturgeon C Project during subsequent Board meetings. Importantly, no objections were raised by the Board in these meetings. This fact was corroborated by PW41 who confirmed that the Board had been kept informed. This evidence supported the appellant's contention that the Board was aware of, and by reasonable deduction, implicitly approved the continued implementation of the Sturgeon Project.

D [62] Furthermore, the appellant presented evidence that the Sturgeon Project was undertaken in good faith as a strategic initiative to generate alternative revenue streams for FELDA. This need for alternative income arose after the listing of FGV which had significantly diminished FELDA's financial resources. PW41 confirmed that FELDA encountered E substantial financial difficulties following the listing of FGV. This testimony supported the appellant's rationale for pursuing the Sturgeon Project as a means of financial sustainability for FELDA.

[63] In *Periasamy Sinnappan v. Pendakwa Raya* [1996] 3 CLJ 187 CA; [1996] 1 MLRA 277; [1996] 2 MLJ 557; [1996] 2 AMR 2511 (refd), the Court of F Appeal held that a person who acts under an honest belief, even if such belief is ultimately mistaken, cannot be found guilty of criminal breach of trust. The evidence presented by the appellant, if properly considered, suggested that he honestly believed he was acting within his lawful authority and in the best interests of FELDA. This belief, if accepted, would negate the element of dishonest intention required to establish the G principal offence of criminal breach of trust.

[64] The learned trial judge's failure to adequately consider this defence evidence and to determine whether it raised a reasonable doubt as to the appellant's guilt constituted a serious misdirection.

Failure to produce crucial minutes of Board meeting and audio recordings

H [65] A fundamental weakness in the prosecution's case was its failure to produce critical evidence relating to FELDA Board meetings. This failure was particularly significant concerning the audio recordings of Board Meeting No. 304 (Special) held on 04.07.2013, a meeting central to the case. PW27, who served as the Board Secretary, testified under I cross-examination that audio recordings of this meeting had been made. This testimony confirmed the existence of recorded evidence that could have clarified the true discussions and decisions made by the Board.

[66] However, when pressed to produce these recordings, PW27 stated that they had been deleted for "security reasons". This explanation lacked credibility given the fundamental importance of Board meeting records in corporate governance. The maintenance of accurate and complete records is especially crucial for an organisation of FELDA's significance. The unexplained deletion of such key evidence raised serious doubts about the integrity of the prosecution's case.

[67] In *Dato' Yap Peng* (*supra*), the Federal Court held that where a tape recording of a meeting exists and the prosecution asserts that the minutes accurately reflect its contents but fails to produce the recording, an adverse inference should be drawn under section 114(g) of the Evidence Act 1950. The Court emphasised that the failure to produce primary evidence, particularly when its existence is established, undermines the prosecution's case and supports the defence's version of events.

[68] This principle was particularly applicable in the present case due to the existence of two conflicting sets of minutes for Board Meeting No. 304 (Special). The prosecution relied on document marked as Exhibit P100 as the official record of the meeting. In contrast, the defence presented document marked as Exhibit D372 which was the original draft minutes prepared by PW27. A comparison of these two documents revealed significant discrepancies, particularly regarding the conditions attached to the approval of the Sturgeon Project.

[69] PW42 admitted to making alterations to the minutes without clear authorisation. Meanwhile, PW27's explanation for these alterations was vague and inconsistent. Their testimony established that the original draft minutes (Exhibit D372) materially differed from the final version (Exhibit P100). The most crucial differences concerned the conditions imposed by the Board when approving the Sturgeon Project. These discrepancies raised substantial doubt as to the accuracy and reliability of the prosecution's version of events.

[70] The prosecution's failure to produce the audio recordings, which would have definitively clarified the discussions and decisions made during the Board meeting, constituted a severe evidentiary gap. Applying the principle established in *Dato' Yap Peng* (*supra*), an adverse inference should be drawn against the prosecution. The absence of the recordings supported the appellant's contention that the Board had, in fact, granted approval for the Sturgeon Project. The deleted recordings could have confirmed whether the Board had imposed conditions on the project or granted it unqualified approval.

[71] Where crucial evidence exists that could definitively establish the prosecution's case but is not produced, the accused must be given the benefit of the doubt. (See: *Public Prosecutor v. Mohd Azam bin Basiron & Anor* [2011] 3 MLJ 741 CA; [2010] 2 MLRA 487; [2010] 9 CLJ 1 (folld)). This principle applies squarely to the present appeal. The prosecution's inability to produce the audio recording of the Board meeting deprived the court of key evidence that could have settled the conflicting versions presented at trial. As such, the benefit of the doubt must be given to the appellant.

A [72] The prosecution's reliance on altered minutes further weakened the reliability of its case. PW42 admitted to making unauthorised alterations to the minutes. PW27 failed to provide a coherent explanation for these changes. These factors raised serious concerns about the credibility of the documentary evidence that formed the foundation of the prosecution's case. The inconsistencies in the minutes of meeting coupled with the B unexplained deletion of the audio recordings created a significant evidentiary gap that severely weakened the prosecution's argument.

Corporate governance and authority

The prosecution's case was fundamentally flawed due to its misunderstanding C of FELDA's corporate structure and governance framework. The evidence provided by PW4 clearly established that the highest authority within FELDA rested with its Board of Directors. Decision-making power over FELDA'S assets and financial commitments was vested in the Board, not in any individual officer including the appellant or Muhammad Sufi. This critical distinction was overlooked by the prosecution.

D [75] The testimony of PW44 further reinforced this principle. PW44 confirmed that any investment exceeding RM100 million required express Board approval. Investments below this threshold fell within the purview of the Investment Committee, which was subsequently replaced by FIC. However, despite this delegation of authority, the Investment Committee and FIC remained subject to Board oversight and were accountable for E their financial decisions. This governance structure directly contradicted the prosecution's theory that individual officers, such as the appellant and Muhammad Sufi, had the unilateral authority to commit FELDA to substantial financial obligations without Board approval.

[76] The evidence further demonstrated that the payments in question F were processed in accordance with FELDA'S established financial procedures. These payments underwent multiple levels of scrutiny, approval and oversight procedures. PW44 explicitly confirmed that the payments followed the requisite internal procedures and were duly reported to the Board. This evidence indicated that the payments were part of FELDA's routine business operations rather than an orchestrated G scheme to misappropriate funds. The prosecution failed to establish any deviation from the established financial protocols.

[77] Additionally, subsequent Board meeting minutes, marked as document Exhibit P352, showed that when updates on the Sturgeon Project were presented, no objections were raised by the Board. This was H corroborated by the testimony of PW41, PW44 and other prosecution witnesses, all of whom confirmed that the Board had been kept informed of the project's progress. This documentary evidence directly undermined the prosecution's assertion that the Sturgeon Project lacked proper Board approval or oversight. The failure of the prosecution to reconcile this contradiction further weakened its case against the appellant.

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[78] The evidence in the present appeal demonstrated that losses associated with the Sturgeon Project only materialized after its premature termination by FELDA's new management. By that time, the appellant had already left FELDA. This strongly suggested that the losses arose due to subsequent business decisions rather than any alleged criminal misconduct by the appellant or Muhammad Sufi. The prosecution failed to establish any direct causal link between the appellant's actions and the financial losses incurred. Financial losses resulting from business decisions, without evidence of dishonest intent, do not constitute criminal liability.

[79] In light of these findings, the prosecution's failure to correctly interpret FELDA's corporate governance structure, its inability to establish unauthorised financial commitments and its reliance on speculative assertions regarding financial losses rendered its case untenable.

Dishonest intention

[80] A fundamental element of the principal offence of criminal breach of trust is the presence of dishonest intention. It is well established that the *mens rea* requirement under section 24 of the Penal Code, as encapsulated in the term "dishonestly", necessitates proof of an intention to cause either wrongful gain or wrongful loss. The prosecution bore the burden of proving beyond reasonable doubt that the appellant acted with such intent as distinguished from proof of actual wrongful loss or gain.

[81] However, the prosecution failed to discharge this burden. The evidence did not establish that the appellant acted with dishonest intent. Instead, the evidence indicated that the appellant's actions were directed toward securing FELDA's financial stability following the listing of FGV. This corporate restructuring had significantly diminished FELDA's revenue streams necessitating alternative investment strategies to sustain its operations. PW41 confirmed that FELDA faced financial difficulties post-listing. This testimony directly supported the appellant's explanation that the Sturgeon Project was pursued as a means of generating alternative revenue for FELDA.

[82] The testimony of PW26 further reinforced this position. PW26 stated that feasibility studies conducted prior to the project's approval projected that the Sturgeon Project would be profitable. Additionally, PW41 conceded under cross-examination that the project was a good project. This acknowledgment from the prosecution's own witnesses contradicted the assertion that the appellant had pursued the project dishonestly or with the intent to cause wrongful loss to FELDA. The losses associated with the Sturgeon Project only materialized after FELDA's new management made the decision to prematurely terminate the project. At that time, the appellant had already left FELDA, further severing any causal link between his actions and the financial losses incurred.

[83] The principle established in *Periasamy* (*supra*) is directly applicable to the present case. In that case, the Court of Appeal held that a person acting under an honest belief, even if that belief was ultimately mistaken, cannot be guilty of criminal breach of trust. The evidence adduced at trial

strongly suggested that the appellant acted under the genuine belief that he was operating within the scope of his authority and in furtherance of FELDA's best interests. This belief, whether correct or not, negated the element of dishonest intention required to establish the principal offence of criminal breach of trust.

[84] In light of this evidence, I hold the considered view that the prosecution has failed to establish beyond reasonable doubt that the appellant had acted dishonestly. The learned trial judge's failure to properly analyse and consider this crucial element of the offence constituted a serious misdirection in law.

Defects in the charges

[85] The charges framed against the appellant did not specify the precise manner in which the alleged abetment under section 107 of the Penal Code was committed. (See: *Datuk Tiah Thee Kian v. Public Prosecutor* [2002] 1 MLJ 585; [2001] 4 MLRH 453; [2002] 2 CLJ 21 (refd); [2001] AMEJ 0055). While the law does not impose an absolute requirement to specify the exact mode of abetment in the charge, the omission became critical in the context of the present appeal. The learned trial judge failed to make clear and definitive findings on which mode of abetment, whether by instigation, command, conspiracy or intentional aid, was proven by the evidence. This failure created ambiguity and prejudiced the appellant's ability to effectively prepare his defence.

[86] Additionally, a fundamental inconsistency existed between the principal charge against Muhammad Sufi and the abetment charges against the appellant. The charge against Muhammad Sufi specifically referenced the misappropriation of FELDA Caviartive's funds, whereas the abetment charges against the appellant referred to FELDA's funds. This distinction was not minor, as FELDA and FELDA Caviartive were legally distinct entities with separate financial structures. This inconsistency had the potential to mislead the appellant in preparing his defence as he was not clearly informed of the precise financial transactions that formed the basis of the allegations against him.

[87] The legal principles articulated in *Ravindran Ramasamy v. Public Prosecutor* [2015] 6 MLJ 509 FC; [2015] 3 MLRA 112; [2015] 3 CLJ 421 (refd) are directly applicable to the present appeal. In that case, the Federal Court held that sections 156 and 422 of the Criminal Procedure Code cannot be invoked to cure a defective charge if the accused was misled to the extent that a failure of justice occurred. The defects in the charges against the appellant, when considered alongside the learned trial judge's misdirections, resulted in procedural unfairness. These deficiencies cumulatively led to a failure of justice that could not be remedied by the application of curative provisions under the Criminal Procedure Code.

[88] Given these material defects in the charges, coupled with the learned trial judge's failure to properly address the inconsistencies, the appellant was deprived of a fair trial. The errors were not mere irregularities but went to the root of the charge proffered against the appellant.

Application of *Tunde Apatira & Ors v. PP*

[89] In *Tunde Apatira* (*supra*), the Federal Court laid down the general principle regarding appellate intervention in cases involving judicial misdirection. The apex court remarked as follows:

> As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction.

[90] The Federal Court in *Tunde Apatira* (*supra*) upheld the convictions despite the misdirection because the evidence against the appellants was entirely overwhelming. His Lordship the Honourable Gopal Sri Ram JCA (later FCJ) said:

> Having scrutinised the record with care, we are satisfied that this is an appropriate case for the application of the proviso. The evidence, both direct and circumstantial, against the appellants is entirely overwhelming. A court applying s. 37(da) in the manner required by Muhammed bin Hassan would have nevertheless convicted the appellants on the available evidence.

[91] The present appeal, however is fundamentally distinguishable from *Tunde Apatira* (*supra*) for several reasons.

First, in *Tunde Apatira* (*supra*), the misdirection pertained to a specific point of law concerning the interpretation of a statutory provision. In contrast, in the present appeal the misdirections by the trial judge were far more serious. They went to the very core of the learned trial judge's understanding of the nature of the charges against the appellant. The learned trial judge conflated the elements of the principal offence under section 409 of the Penal Code with those of abetment under section 109, thereby fundamentally misconceiving the legal framework applicable to the appellant's case.

[92] Second, in *Tunde Apatira* (*supra*), the Federal Court upheld the convictions because the evidence against the appellants was entirely overwhelming. The Court was satisfied that a properly directed tribunal would have inevitably reached the same conclusion. By contrast, in the present appeal the prosecution's evidence did not establish the appellant's guilt beyond reasonable doubt. As previously discussed, the prosecution's case suffered from substantial deficiencies in proving the essential elements of abetment under section 107 of the Penal Code. The evidence did not demonstrate that the appellant had instigated, conspired, commanded or intentionally aided the commission of the principal offence. The misdirections by the learned trial judge in assessing these elements were not minor or technical errors but went to the very foundation of the conviction.

[93] Third, in *Tunde Apatira* (*supra*), the Federal Court was satisfied that the totality of the evidence reasonably supports the conclusion that the offence was committed even in the absence of the incorrect legal presumption applied by the trial judge. In the present appeal, the totality of the evidence does not support the conclusion that the appellant committed abetment under section 109 of the Penal Code. The prosecution failed to establish any of the modes of abetment defined in section 107. Furthermore, there was substantial evidence supporting the appellant's defence that he acted in good faith and within the scope of his authority.

[94] Therefore, the exceptional circumstances that justified upholding a conviction despite a misdirection in *Tunde Apatira* (*supra*) are not present in this case. The general principle stated in *Tunde Apatira* (*supra*) that a conviction should be quashed where there has been a misdirection, must be applied. This principle was reaffirmed in *Alcontara* (*supra*), where the Federal Court held that a conviction must be set aside when misdirections fundamentally affect the fairness of the trial. Given the nature and extent of the misdirections in the present case, the appellant's conviction cannot stand and ought to be quashed to rectify the miscarriage of justice.

Conclusion

[95] For the reasons set out above, I find that the prosecution failed to establish its case beyond reasonable doubt. The prosecution was unable to prove the essential elements of abetment as required under section 107 of the Penal Code. This failure, when considered alongside the learned trial judge's multiple misdirections and the significant evidentiary deficiencies, rendered the conviction fundamentally unsafe and unsustainable in law.

[96] Given these circumstances, the appeal against both conviction and sentence are allowed. The conviction and sentence imposed by the trial court are hereby set aside. The appellant is accordingly acquitted and discharged of both charges.

Nas Undang-Undang Berkaitan Persubahatan

[45] Di dalam kes *PP v. Datuk Haji Harun Haji Idris & Ors* [1977] CLJU 92; [1977] 1 LNS 92; [1977] 1 MLJ, Abdoolcader di ms. 180 (CLJ); 196 (MLJ) menerangkan mengenai s. 107 Kanun Keseksaan seperti yang berikut:

> Instigation consists of acts which amount to active suggestion or support or stimulation for the commission of the main act or offence. Advice can also become the commission of an offence (*Ragunath Das v. Emperor*). Abetment by conspiracy consists in the combination and agreement of persons to do some illegal act or to affect some illegal purpose by illegal means. Proof of conspiracy need not be direct proof but can be a matter of inference deducted from certain criminal acts of the accused done in pursuant of an apparent criminal purpose in common between them (*Emperor v. Abdul Hamid*). Abetment by aiding takes place when a person by the commission of an act intends to facilitate and does in fact facilitate

the commission of an act (*Faguna Kanta Nath v. State of Assam*). Where there is show a positive act of assistance voluntarily done by a person with a knowledge of the circumstances constituting an offence, the abettor is guilty of abetment by aiding (*National Coal Board v. Gamble*).

Ringkasan Hujahan Perayu/Pendakwa Raya

(i) bahawa kesemua elemen-elemen persubahatan di bawah s. 109 Kanun Keseksaan telah berjaya dibuktikan;

(ii) pertuduhan terhadap responden tidak cacat, jelas dan tidak bertindih;

(iii) tiada salah arah oleh hakim bicara ketika membuat penemuan dapatan bersalah terhadap responden;

(iv) hakim bicara telah membuat penilaian yang betul pada peringkat pembelaan;

(v) tidak berlaku sebarang salah arah atau ketidakaturan di dalam penghakiman Mahkamah Sesyen dan sekiranya ada ianya masih boleh dibaiki di bawah s. 422 Kanun Prosedur Jenayah; dan

(vi) Mahkamah Tinggi telah gagal membuat penilaian semula terhadap segala keterangan yang ada dan juga telah gagal untuk membuat dapatan terhadap keterangan yang telah dikemukakan secara kredibel pada peringkat perbicaraan.

Dapatan Kami

[46] Setelah kami mempertimbangkan hujahan kedua-dua pihak, kami berpandangan isu utama yang harus diputuskan adalah sama ada terdapat keperluan untuk kajian projek sturgeon dan kaviar ini dibentangkan semula kepada Lembaga FELDA untuk mendapat kelulusan.

[47] Mengikut keterangan SP27, perenggan 4 minit mesyuarat khas Bil 304 (P100) menyatakan bahawa:

(iv) Bentangkan kepada Lembaga laporan kajian terperinci pelaburan yang akan dibuat untuk mendapatkan kelulusan pada asalnya tidak pernah wujud di dalam draf buku mesyuarat tetapi kemudiannya di dalam minit mesyuarat lembaga FELDA 304 Khas P100 pula ianya ada.

[48] Persoalannya, bilakah pula perenggan 4 eksh. P100 ini dimasukkan ke dalam minit mesyurat khas Bil 304 bertarikh 4 Julai 2013? Bagi merungkai keraguan mengenai isu ini, pada hemat kami adalah amat penting rakaman audio pada tarikh mesyuarat tersebut dikemukakan sebagai ekshibit kes pendakwaan. Namun malangnya, ini gagal dikemukakan oleh pihak pendakwaan. Kegagalan mengemukakan keterangan dokumentar tersebut telah meruntuhkan kes pendakwaan.

[49] Sehubungan dengan itu, kami bersependapat dengan dapatan Hakim Mahkamah Tinggi yang bijaksana apabila beliau di dalam alasan penghakimannya mengupas isu terpenting ini dengan huraian seperti berikut:

> Failure to produce crucial minutes of Board meeting and audio recordings
>
> [65] A fundamental weakness in the prosecution's case was its failure to produce critical evidence relating to FELDA Board meetings. This failure was particularly significant concerning the audio recordings of Board Meeting No. 304 (Special) held on 04.07.2013, a meeting central to the case. PW27, who served as the Board Secretary, testified under cross-examination that audio recordings of this meeting had been made. This testimony confirmed the existence of recorded evidence that could have clarified the true discussions and decisions made by the Board.
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> [66] However, when pressed to produce these recordings, PW27 stated that they had been deleted for "security reasons". This explanation lacked credibility given the fundamental importance of Board meeting records in corporate governance. The maintenance of accurate and complete records is especially crucial for an organisation of FELDA's significance. The unexplained deletion of such key evidence raised serious doubts about the integrity of the prosecution's case.
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> [67] In *Dato' Yap Peng* (*supra*), the Federal Court held that where a tape recording of a meeting exists and the prosecution asserts that the minutes accurately reflect its contents but fails to produce the recording, an adverse inference should be drawn under section 114(g) of the Evidence Act 1950. The Court emphasised that the failure to produce primary evidence, particularly when its existence is established, undermines the prosecution's case and supports the defence's version of events.
>
> [68] This principle was particularly applicable in the present case due to the existence of two conflicting sets of minutes for Board Meeting No. 304 (Special). The prosecution relied on document marked as Exhibit P100 as the official record of the meeting. In contrast, the defence presented document marked as Exhibit D372 which was the original draft minutes prepared by PW27. A comparison of these two documents revealed significant discrepancies, particularly regarding the conditions attached to the approval of the Sturgeon Project.
>
> [69] PW42 admitted to making alterations to the minutes without clear authorisation. Meanwhile, PW27's explanation for these alterations was vague and inconsistent. Their testimony established that the original draft minutes (Exhibit D372) materially differed from the final version (Exhibit P100). The most crucial differences concerned the conditions imposed by the Board when approving the Sturgeon Project. These discrepancies raised substantial doubt as to the accuracy and reliability of the prosecution's version of events.
>
> [70] The prosecution's failure to produce the audio recordings, which would have definitively clarified the discussions and decisions made during the Board meeting, constituted a severe evidentiary gap. Applying the principle established in *Dato' Yap Peng* (*supra*), an adverse inference

should be drawn against the prosecution. The absence of the recordings supported the appellant's contention that the Board had, in fact, granted approval for the Sturgeon Project. The deleted recordings could have confirmed whether the Board had imposed conditions on the project or granted it unqualified approval.

[71] Where crucial evidence exists that could definitively establish the prosecution's case but is not produced, the accused must be given the benefit of the doubt. (See: *Public Prosecutor v. Mohd Azam bin Basiron & Anor* [2011] 3 MLJ 741 CA; [2010] 2 MLRA 487; [2010] 9 CLJ 1 (folld)). This principle applies squarely to the present appeal. The prosecution's inability to produce the audio recording of the Board meeting deprived the court of key evidence that could have settled the conflicting versions presented at trial. As such, the benefit of the doubt must be given to the appellant.

[72] The prosecution's reliance on altered minutes further weakened the reliability of its case. PW42 admitted to making unauthorised alterations to the minutes. PW27 failed to provide a coherent explanation for these changes. These factors raised serious concerns about the credibility of the documentary evidence that formed the foundation of the prosecution's case. The inconsistencies in the minutes of meeting coupled with the unexplained deletion of the audio recordings created a significant evidentiary gap that severely weakened the prosecution's argument.

[ ] ...

[84] In light of this evidence, I hold the considered view that the prosecution has failed to establish beyond reasonable doubt that the appellant had acted dishonestly. The learned trial judge's failure to properly analyse and consider this crucial element of the offence constituted a serious misdirection in law.

[50] Justeru itu, kami sebulat suara mendapati tiada merit di dalam rayuan ini untuk mewajarkan kami campur tangan di dalam keseluruhan dapatan terperinci yang telah dibuat oleh Hakim Mahkamah Tinggi yang bijaksana.

[51] Keputusan Mahkamah Tinggi dalam mengenepikan sabitan dan hukuman yang dibuat oleh Mahkamah Sesyen terhadap responden dikekalkan.

[52] Bagi isu-isu lain yang diketengahkan oleh kedua-dua pihak, dengan hormatnya kami tidak berhasrat untuk mengupasnya satu persatu. Ini adalah kerana pandangan kami terhadap isu-isu sampingan tersebut tidak sedikit pun mampu untuk mengubah dapatan yang telah kami buat di atas.